

## REMARKS

Claims 1-17 stand rejected. No claims are added or canceled by amendment. Accordingly, claims 1-17 are at issue.

The examiner states that the examiner relies on the priority date (June 28, 2000) of Provisional Application No. 60/214,436, as the §102(e) date for Gaillard, U.S. Pub. No. 20030028458 (“Gaillard”). See communication mailed 12/27/2004, p. 9. Gaillard however, should not be given the priority date of the provisional application for prior art purposes. First, Gaillard is a U.S. published application that claims the benefit of an international application WO 02/0152(A1), filed on March 21, 2001. To be entitled to an earlier filing date for prior art purposes, the international application (PCT application) would have to meet all of the following *three* conditions:

- (a) an international filing date on or after November 29, 2000;
- (b) designated the United States; and
- (c) **published under PCT Article 21 (2) in English.**

MPEP §706.02(f)(1)(CC)(1) (emphasis added); See also, 35 U.S.C. § 102(e) (“only if the international application . . . was published . . . in the English language”).

The Gaillard PCT Application, however, was published in French, not English. Accordingly, for prior art purposes, Gaillard is not given an earlier priority date:

If the international application was filed on or after November 29, 2000, but did **not** designate the United States, or was **not published in English** under PCT Article 21(2), do **not** treat the international filing date as a U.S. filing date >for prior art purposes< . . . the reference may be applied under 35 U.S.C. §102(a) or (b) as of its publication date, or 35 U.S.C. §102(e) as of any later U.S. filing date of an application that properly claimed the benefit of the international application (if applicable).

MPEP 706.02(f)(1)(C)(2) (bold in original, italics added). See also, MPEP 706.02(f)(1) Examples 5, 8 and Flow Chart I.

Additionally, even if Gaillard were able to claim the 102(e) date of its earliest priority application, because Gaillard is a continuation *in part* of several applications, the examiner has not shown that the earliest provisional application (60/214,436) discloses the subject matter used in the rejection. See MPEP 706.02(f)(1)(C)(1). For example, the rejections rely, at least in part, on Fig. 3 to Gaillard. This figure is not disclosed in provisional application 60/214,436. Gaillard is not entitled to the date of its earliest provisional application for this additional reason.

Claims 1-4, 8 stand rejected under 35 U.S.C. § 102(e) as being anticipated by Gaillard. The filing date for the present application is July 10, 2000. The filing date for Gaillard is more than two years later, September 27, 2002. Accordingly, Gaillard is not prior art under § 102(e). As set forth above, Gaillard is not entitled to a section 102(e) date corresponding to one of its provisional applications because the intervening international application was published in French and because the provisional application does not disclose all of the subject matter relied upon in the rejection. The rejections to claims 1-4 and 8 should be withdrawn.

Claims 4-7, 9-11, 12-15, 16, and 17 also stand rejected under 35 U.S.C. § 103 based on combinations of Gaillard with one or more other publications or patents. All of these rejections should be withdrawn, for the reasons given above, i.e., Gaillard is not properly asserted as prior art under 102 (e).

Additionally, the unpublished provisional application, on its own, is not properly asserted as prior art under 35 U.S.C. §102(e) (“the invention was described in (1) an application for patent, published under §122(b)”).

A notice of appeal is being filed concurrently with this reply.

If the Examiner find that there are any outstanding issues which may be resolved by a telephone interview, the Examiner is invited to contact the undersigned at the below listed number.

Respectfully submitted,  
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